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DOCKET NO.: CC-3577/A0459US **PATENT**

OIPE IAP51
DEC 18 2006
PATENT & TRADEMARK OFFICE

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In Re Application of:
Ronald C. Schumann et al.

Confirmation No.: 4760

Application No.: 10/679,966

Group Art Unit: 3754

Filing Date: October 6, 2003

Examiner: Eric S. Keasel

For: BI-CAN HAVING INTERNAL BAG

EXPRESS MAIL LABEL NO: EV 864897622 US
DATE OF DEPOSIT: December 18, 2006

EV864897622US

MS Appeal Brief - Patent
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

APPEAL BRIEF TRANSMITTAL PURSUANT TO 37 CFR § 41.37

Transmitted herewith in triplicate is the APPEAL BRIEF in this application with respect to the Notice of Appeal received by The United States Patent and Trademark Office on **May 16, 2006**.

☐ Applicant(s) has previously claimed small entity status under 37 CFR § 41.37 .

☐ Applicant(s) by its/their undersigned attorney, claims small entity status under 37 CFR § 1.27 as:

- ☐ an Independent Inventor
- ☐ a Small Business Concern
- ☐ a Nonprofit Organization.

☒ Petition is hereby made under 37 CFR § 1.136(a) (fees: 37 CFR § 1.17(a)(1)-(4) to extend the time for response to the Notice of Appeal of May 16, 2006 to and through Monday, December 18, 2006 comprising an extension of the shortened statutory period of five months.

12/20/2006 AWONDAF1 00000094 10679966

02 FC:1255 2160.00 OP

	SMALL ENTITY		NOT SMALL ENTITY	
	RATE	FEE	RATE	FEE
☒ APPEAL BRIEF FEE	$250	$	$500	$500
☐ ONE MONTH EXTENSION OF TIME	$60	$	$120	$
☐ TWO MONTH EXTENSION OF TIME	$225	$	$450	$
☐ THREE MONTH EXTENSION OF TIME	$510	$	$1020	$
☐ FOUR MONTH EXTENSION OF TIME	$795	$	$1590	$
☒ FIVE MONTH EXTENSION OF TIME	$1080	$	$2160	$2160
☐ LESS ANY EXTENSION FEE ALREADY PAID	minus	($)	minus	($)
TOTAL FEE DUE		$0		$2,660

☒ The Commissioner is hereby requested to grant an extension of time for the appropriate length of time, should one be necessary, in connection with this filing or any future filing submitted to the U.S. Patent and Trademark Office in the above-identified application during the pendency of this application. The Commissioner is further authorized to charge any fees related to any such extension of time to Deposit Account 23-3050. This sheet is provided in duplicate.

☐ A check in the amount of $ .00 is attached. Please charge any deficiency or credit any overpayment to Deposit Account No. 23-3050.

☐ Please charge Deposit Account No. 23-3050 in the amount of $ .00. This sheet is attached in duplicate.

☒ The Commissioner is hereby authorized to charge any deficiency or credit any overpayment of the fees associated with this communication to Deposit Account No. 23-3050.

Date: December 18, 2006

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DOCKET NO.: CC-3577/A0459US **PATENT**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of: **Ronald C. Schumann et al.**	Confirmation No.: **4760**
Serial No.: **10/679,966**	Group Art Unit: **3754**
Filing Date: **October 6, 2003**	Examiner: **Eric S. Keasel**
For: **BI-CAN HAVING INTERNAL BAG**	

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Commissioner for Patents
P.O. Box 1450
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Sir:

APPELLANT'S BRIEF PURSUANT TO 37 C.F.R. § 41.37

This brief is being filed in support of Appellant's appeal from the rejections of claims 1-7 and 10-21 in the office action dated November 16, 2006. A Notice of Appeal was filed on May 16, 2006.

1. REAL PARTY IN INTEREST

Crown Cork & Seal Technologies Corporation, by virtue of the assignment recorded on May 24, 2004, at Reel 015351, Frame 0879, is the real party in interest.

2. RELATED APPEALS AND INTERFERENCES

None.

3. STATUS OF CLAIMS

Claims 1 – 7 and 10 – 21 are under rejection; Claims 8 and 9 have been allowed; and claims 22 – 29 have been withdrawn. Claims 1 – 7 and 10 – 21 are appealed. Only independent claims 1 and 13 and dependent claim 16 will be argued in this Appeal.

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4. STATUS OF AMENDMENTS

Appellants did not file a response to the Final Office action dated February 23, 2005.

5. SUMMARY OF CLAIMED SUBJECT MATTER

Each one of independent claims 1 and 13 is directed to a pressurizable can assembly for containing and dispensing products. In the embodiment of Figures 1A, 2A, 3A, and 4A, and as described most particularly in paragraphs 0022 through 0033 (and generally throughout the specification), can 10 includes a body 12, a cap 14, a nozzle 18, and an inner container, such as bag 20. A portion 26 of body 12 and a portion 32 of the cap 14 form a seam 26. (paragraph 0025) Bag 20 has a peripheral thickened portion 54 that is located in a throat 31 formed by the body and cap *such that thickened portion 54 is spaced apart from seam 26.* (paragraph 0034). A constriction 44 in throat 31 prevents retains the thickened portion 54 of bag 20.

Locating the thickened part 54 away from the seam 26 has the advantage of diminishing the chance of rupturing the bag during the seaming process. As explained in the background section, "conventional bags are prone to being ruptured in some conventional processes in which bags are formed as part of a seam or crimp – either between the cap and nozzle assembly or between the cap and body." (paragraph 0003). Spacing thickened portion 24 from the seam also prevents rupturing the bag upon top loading of the can when cans are stacked: "Bag 20 being spaced apart from seam 34 diminishes the tendency for a downward force to rupture bag 20." (paragraph 0034).

6. GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL

Claim 1 has been rejected under Section 103 based on United States Patent Number 4,150,522 (Burger) in view of United States Patent Number 5,915,595 (Dow). Claims 13 and claim 16 have been rejected under Section 102 based on Burger.

The final rejection states that Burger discloses all of the elements of claim 1 except Burger fails to disclose double seams, which are taught by Dow, and that the combination would be obvious. (Final Rejection, paragraph 7). The final rejection states that Burger discloses all of the limitations of claim 13. (Id., paragraph 5). And, in response to Applicant's argument, the final rejection states that "The seam of Burger is rolled. Please compare Burger, Fig. 2 to Applicant's figures. Burger seam is more rolled than Applicant despite use of the word crimped." (Id.)

7. ARGUMENT

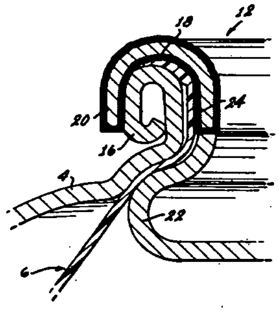
1. The Cited References Neither Teach Nor Suggest A Can Having A "Seam [] Spaced Apart From The Bulbous End Of The Flange" Of An Inner Container, As Recited In Claims 1

Claim 1 recites a container having a body, a cap and a "throat formed between a portion of the body and a portion of the cap;" also, a "distal portion of the throat terminat[es] at the seam." The inner container has a "*thickened portion* [that is] disposed in the throat *and spaced apart from the seam*." (emphasis added). Neither Burger nor Dow disclose this structure.

Rather, the Burger reference teaches a crimping process to join neck 16 of outer container 4 to ears 80 of cap 12. Ears 80 of cap 12 are disposed over neck 16 of container 4. A crimped portion 20 contacts an outboard side of neck 16. Flexible ring 18 is generally disposed between cap 12 and container 14 in a space 24 inboard of crimped portion 20 as shown in Figure 2.

Applicants assume that the office action interprets Burger's crimped portion 20 to constitute the claimed "seam" and Burger's space 24 to constitute the claimed "throat." This construction, for the purpose of argument, would appear to be required to satisfy the limitations of as-filed claim 1. Applicants reproduce Burger's Figures 2, 9, and 11 below to illustrate the structure disclosed in Burger:

FIG. 2



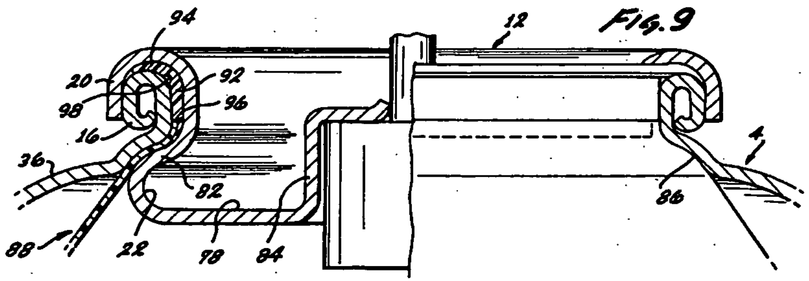
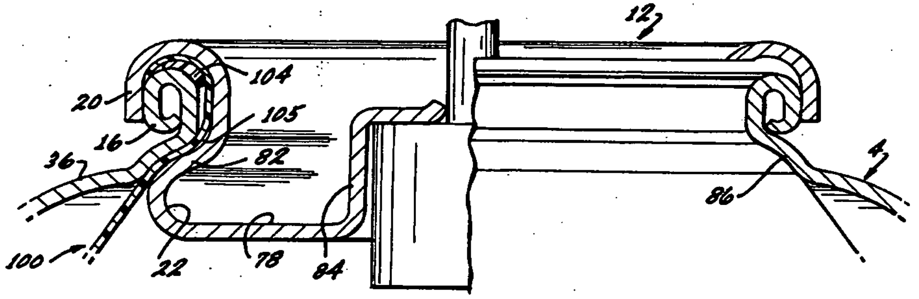


FIG. 9

Fig. 11



Burger (PRIOR ART) Figures

Claim 1 recites that the "cap seam portion [has] a pair of opposing sidewalls and an arcuate portion therebetween," which clarifies the portion of Applicant's structure that constitutes the seam. For clarity of argument, the structure of Burger that could correspond to this structure has been highlighted above in Burger's Figure 2. Further, claim 1 states that "a portion of the body seam portion is disposed between the relatively opposing sidewalls of the cap seam portion." The structure (again, for the purpose of argument) in Burger that corresponds to the recited "seam" structure encompasses or overlaps space 24. According to this reading of Burner, it discloses neither that the "thickened portion being disposed in the throat" nor that the "thickened portion being . . . spaced apart from the seam," as recited in Applicants' claim 1. In fact, Burger discloses that its "thickened portion" of its inner container is disposed nearly entirely within the portion that corresponds to a "seam." Accordingly, Burger neither teaches nor suggests the limitations of claim 1.

2. Claim 13 Is Patentable For The Same Reasons As Claim 1

Claim 13 recites "said thickened portion being disposed in the throat and *spaced apart from the seam*." Claim 13 does not recite "said cap seam portion including a pair of opposing sidewalls and an arcuate portion formed therebetween, the body seam portion is at least partially disposed between the relatively opposing sidewalls of the cap seam portion" to clarify what constitutes the seam, yet claim 13 is allowable over Burger and other art, which does not disclose the spaced apart relationship of the thickened portion of the inner container and the seam.

Claim 13 is also patentable on the basis explained immediately below.

3. Claims 13 And 16 Are Patentable Because Burger Cannot Be Properly Combined With Dow, And Even If (Improperly) Combined, The Combination Would Not Yield Applicant's Invention

Claim 16 recites a "double seam" and depends from claim 13. Claim 13 recites a "rolled seam." A "double seam" is a type of "rolled seam," and each is distinguishable from the structure and function of a "crimp" disclosed in Burger. Accordingly, even though claim 13 is rejected based on Section 102, Applicants submit that the crimp disclosed in Burger does not constitute a "rolled seam." Therefore, claim 13 should only have been rejected under the same grounds as the rejection of claim 16. Applicant below explains that claims 13 and 16 can not be permissibly rejected based on the combination of Burger and Dow.

Dow discloses a double seam for joining a container body and cap. It appears that the office action suggests that ears 80 of Applicant's cap and neck 16 of the container be formed into a double seam as taught by Dow. However, the combination of Burger and Dow is impermissible and, even if the references were to be combinable, the combination would not satisfy all of the limitations of amended claim 13 (nor claim 16).

Regarding the combination, providing a space (24) for housing the thickened portion of flexible ring (18) to prevent tearing of the inner container (6) is a fundamental principle of operation of the teachings of Burger. For example, Burger recites in its Summary of the Invention:

> During crimping, a space is provided between the neck opening and a portion of the surface of the dispensing cap to prevent tearing of the flexible inner container during crimping.
> (Burger, col. 2, lines 21-24).

Modifying Burger to use the double seam of Dow would likely tend to crush the space 24 and create the forces and possible metal movement that may subject its inner container 6 and flexible ring 18 to the tearing phenomenon that Burger is intended to prevent. Accordingly, it is impermissible to modify the structure of Burger according to the teaching of a double seam in Dow because it would change a fundamental principle of operation of Burger: providing a space to prevent tearing of the flexible inner container (including flexible ring 18),

Even assuming for the sake of argument that Burger's structure could be modified to form a rolled seam or a double seam, the resulting structure would not satisfy the limitation "said thickened portion being disposed in the throat and spaced apart from the seam" because neither Burger nor Dow teach or suggest this limitation. Accordingly, Applicant submits that claims 13 and 16, and other claims which depend from them, are allowable.

8. CLAIMS APPENDIX

1. (rejected and appealed) A pressurizable can assembly capable of dispensing a product disposed therein, said can assembly comprising:

a body including a body sidewall and a seam portion;

an enclosed lower portion disposed at a bottom of the body;

a cap including a cap sidewall and a seam portion; the body seam portion and the cap seam portion forming a seam securing the body to the cap, said cap seam portion including a pair of opposing sidewalls and an arcuate portion formed therebetween, the body seam portion is at least partially disposed between the relatively opposing sidewalls of the cap seam portion;

a nozzle assembly disposed at an upper portion of the cap;

a throat formed between a portion of the body and a portion of cap, a distal portion of the throat terminating at the seam; and

an inner container disposed at least partly in the can body, the inner container having a peripheral thickened portion at an upper edge thereof, said thickened portion being disposed in the throat and spaced apart from the seam.

2. (rejected and appealed) The can of claim 1 wherein the body includes a neck and the cap includes a neck.

3. (rejected and appealed) The can of claim 2 wherein the throat is formed between the body neck and the cap neck.

4. (rejected and appealed) The can of claim 3 wherein the throat comprises a constriction that opens into an annulus.

5. (rejected and appealed) The can of claim 4 wherein the thickened portion of the inner container includes a bulbous end.

6. (rejected and appealed) The can of claim 5 wherein the bulbous end is disposed in the annulus.

7. (rejected and appealed) The can of claim 6 wherein the inner container includes an outwardly oriented flange, the bulbous end being disposed on the periphery of the flange.

8. (allowed) A pressurizable can assembly capable of dispensing a product disposed therein, said can assembly comprising:

a body including a body sidewall and a seam portion;
an enclosed lower portion disposed at a bottom of the body;
a cap including a cap sidewall and a seam portion; the body seam portion and the cap seam portion forming a seam securing the body to the cap;
a nozzle assembly disposed at an upper portion of the cap;
a throat formed between a portion of the body and a portion of cap, a distal portion of the throat terminating at the seam, the throat comprises a constriction that opens into an annulus; and
an inner container disposed at least partly in the can body, the inner container having a bulbous end at an upper edge thereof, said thickened portion being disposed in the throat and spaced apart from the seam, the thickened portion includes an outer thickened portion that is disposed in the constriction and an inner thickened portion having a thickness greater than the outer thickened portion, the outer thickened portion being proximate the bulbous end.

9. (allowed) The can of claim 8 wherein the inner thickened portion prevents the flange from moving outwardly in the throat.

10. (rejected and appealed) The can of claim 2 wherein the body seam portion is disposed at a distal end of the body neck and the cap seam portion is disposed at a distal end of the cap neck.

11. (rejected and appealed) The can of claim 10 wherein the body neck extends radially outwardly from the body sidewall and the cap neck extends radially outwardly from the cap sidewall.

12. (rejected and appealed) The can of claim 11 wherein the body neck and the can neck extend upwardly.

13. (rejected and appealed) A pressurizable can assembly capable of dispensing a product disposed therein, said can assembly comprising:

a body including a body sidewall and a seam portion;
an enclosed lower portion disposed at a bottom of the body;
a cap including a cap sidewall and a seam portion; the body seam portion and the cap seam portion forming a rolled seam securing the body to the cap;
a nozzle assembly disposed at an upper portion of the cap;
a throat formed between a portion of the body and a portion of cap, a distal portion of the throat terminating at the seam; and
an inner container disposed at least partly in the can body, the inner container having a peripheral thickened portion at an upper edge thereof, said thickened portion being disposed in the throat and spaced apart from the seam.

14. (rejected and appealed) The can of claim 13 wherein the seam has an outermost diameter that is smaller than an outermost diameter of the can assembly.

15. (rejected and appealed) The can of claim 14 wherein the seam outermost diameter is smaller than a diameter of the body sidewall.

16. (rejected and appealed) The can of claim 13 wherein the rolled seam is a double seam.

17. (rejected and appealed) The can of claim 13 wherein the seam portion of the body is a seaming panel and the seam portion of the cap is a seaming panel.

18. (rejected and appealed) The can of claim 1 wherein the enclosed lower portion includes a bottom end that is seamed to a bottom portion of the can sidewall.

19. (rejected and appealed) The can of claim 1 wherein the enclosed lower portion is integrally formed with the can body.

20. (rejected and appealed) The can of claim 1 wherein the inner container is a bag.

21. (rejected and appealed) The can of claim 20 wherein the bag is formed of a material comprising nylon.

22. (withdrawn) A method of forming a can assembly for dispensing a product under pressure, comprising the steps of:

providing a body including a body sidewall, a neck, and a seam portion disposed at a distal portion of the neck;

providing a cap including a cap sidewall and a seam portion;

providing an inner container including a flange having a bulbous end;

placing the flange of the inner container between the cap and the body such that (i) the bulbous end is disposed in an annulus formed between the body neck and the cap neck and (ii) a portion of the flange radially inward from the bulbous end is disposed in a constriction formed between the body neck and the cap neck proximate the annulus; and

rolling the body seam portion and cap seam portion together to form a seam, whereby the seam is spaced apart from the bulbous end of the flange.

23. (withdrawn) The method of claim 22 wherein the step of 0 providing an inner container comprises thermoforming the inner container.

24. (withdrawn) The method of claim 23 wherein thermoforming the inner container comprises the steps of:

heating a billet;

disposing the billet into a mold;

deforming a portion of the billet to form the flange of the inner container; and

deforming another portion of the billet to form the body of the inner container.

25. (withdrawn) The method of claim 24 wherein the step of 0 deforming said portion of the billet includes deforming a periphery of the billet between a top mold flange and a bottom mold flange, wherein a space between the top mold flange and bottom mold flange has a shape corresponding the bulbous end of the inner container flange.

26. (withdrawn) The method of claim 25 wherein at least one of the top mold flange and the bottom mold flange are movable to enable removal of the thermoformed bag.

27. (withdrawn) The method of claim 25 wherein the step of 0 deforming said other portion of the billet includes deforming a central portion with a stretch rod an blow air.

28. (withdrawn) The method of claim 22 further comprising the steps of installing a nozzle in a top opening of the cap.

29. (withdrawn) The method of claim 22 further comprising the steps of filling an interior of the inner container and pressurizing the can assembly at an exterior of the inner container.

9. EVIDENCE APPENDIX

None.

10. RELATED PROCEEDINGS APPENDIX

None.

Date: December 18, 2006

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